

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

2/3/62

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

lgitomer@dc.bjllp.com

February 2, 2005

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, DC 20423

ENTERED
Office of Proceedings

FEB 2 - 2005

Part of
Public Record

RE: Finance Docket No. 34536, *Indiana & Ohio Central Railroad, Inc.—Acquisition
and Operation Exemption—CSX Transportation, Inc.*

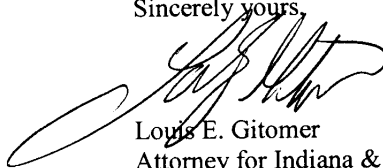
Dear Secretary Williams:

Enclosed for filing are the original and ten copies of a Supplemental Response and three diskettes with the file Supplemental Response.doc.

Please time and date stamp the extra copy of this letter and the Supplemental Response and return them with our messenger. Thank you for your assistance.

If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for Indiana & Ohio Central
Railroad, Inc.

Enclosures

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34536

2/3/62

INDIANA & OHIO CENTRAL RAILROAD, INC.— ACQUISITION AND OPERATION
EXEMPTION—CSX TRANSPORTATION, INC.

RESPONSE OF INDIANA & OHIO CENTRAL RAILROAD, INC. TO
UNITED TRANSPORTATION UNION'S SUPPLEMENTAL PETITION TO REVOKE

ENTERED
Office of Proceedings

FEB 2 - 2005

Part of
Public Record

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
INDIANA & OHIO CENTRAL
RAILROAD, INC.
5300 Broken Sound Blvd., NW
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: INDIANA & OHIO CENTRAL
RAILROAD, INC.

Dated: February 2, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34536

INDIANA & OHIO CENTRAL RAILROAD, INC.— ACQUISITION AND OPERATION
EXEMPTION—CSX TRANSPORTATION, INC.

RESPONSE OF INDIANA & OHIO CENTRAL RAILROAD, INC. TO
UNITED TRANSPORTATION UNION’S SUPPLEMENTAL PETITION TO REVOKE

The Indiana & Ohio Central Railroad, Inc. (“IOCR”), a Class III carrier, responds in opposition to the Supplemental Petition to Revoke Exemption filed on January 18, 2005 (the “Supplement”) by the United Transportation Union (“UTU”). IOCR previously responded on October 1, 2004, to the September 15, 2004 Petition to Revoke Exemption (the “Petition”), and the September 24, 2004 Amended Petition to Revoke Exemption (the “Amended Petition”), both filed by UTU.¹ IOCR respectfully requests that the Surface Transportation Board (the “Board”) deny the relief sought by UTU.

BACKGROUND

IOCR submitted a bid to CSX Transportation, Inc. (“CSXT”) to acquire and operate about 107 miles of railroad.² The line consists of: (1) the Cincinnati Terminal Subdivision between NA Tower, OH, Milepost BB 7.5, and Oakley, OH, Milepost BB 12.4; and (2) the Midland Subdivision between Oakley, OH, Milepost BB 12.4, and Columbus, OH, Milepost BR 114.6, all in the State of Ohio (the “Line”). CSXT selected IOCR as the winning bidder and

¹ IOCR also responded to the Protest filed on September 13, 2004 by the Brotherhood of Locomotive Engineers and Trainmen on October 1, 2004.

negotiated the necessary agreements with IOCR.

IOCR and CSXT are not commonly controlled. IOCR is a subsidiary of RailAmerica, Inc. (“RailAmerica”), a non-carrier short line railroad holding company. CSXT is the subsidiary of CSX Corporation (“CSX”). The management of IOCR has a fiduciary duty to RailAmerica, the holding company of IOCR’s sole stockholder, to negotiate an arms-length commercially reasonable agreement. RailAmerica, a publicly traded company, has a fiduciary responsibility to its shareholders to ensure that its subsidiaries negotiate arms-length commercially reasonable agreements. The management of CSXT has a fiduciary duty to its sole stockholder, CSX to negotiate an arms-length commercially reasonable agreement. CSX, a publicly traded corporation, has a fiduciary responsibility to its shareholders to ensure that its subsidiaries negotiate arms-length commercially reasonable agreements. For legitimate business reasons and to comply with their fiduciary obligations, IOCR and CSXT negotiated the necessary agreements at arms-length. As a result of arms-length negotiations, IOCR and CSXT entered a Lease and Purchase of Rail Improvements dated October 13, 2004 (the “Agreement”).

IOCR elected to follow the exemption procedures to acquire the Line under the provisions of 49 U.S.C. § 10902. IOCR posted, served and certified a labor notice on August 12, 2004 as required by the Board’s rules at 49 C.F.R. § 1150.42(e) (the “Labor Notice”). See the Notice of Exemption filed on September 1, 2004, Exhibit C. The Labor Notice advised CSXT employees that IOCR projected at that time that it would hire four operating employees, one locomotive mechanic and two track inspectors, and that IOCR’s collective bargaining agreement with BLET would apply to the operating employees.

Pursuant to 49 C.F.R. § 1150.43, IOCR filed a Notice of Exemption on September 1,

² IOCR purchased the track and other assets attached to the real estate (the “Improvements”)

2004 (the “Notice”) with the Board. The Notice proposed October 16, 2004 as the consummation date. The Notice also provided all of the information required by 49 C.F.R. § 1150.43 and was duly verified by an officer of IOCR.

The Protest, Petition, and Amended Petition requested the exact same relief: (1) that the Notice be rejected; (2) that the proposed transaction be handled under 49 U.S.C. § 11325(d); and (3) that briefing and hearing be scheduled. Implicit in the relief sought by BLET and UTU is the revocation of the exemption. IOCR fully responded to the Protest, Petition, and Amended Petition in the Response filed on October 1, 2004.

On October 1, 2004, the Board served a notice of the transaction.³ IOCR and CSXT consummated the purchase and sale of the Improvements and lease of the Real Property on October 16, 2004.

After the transaction closed and IOCR began operations, the Board instituted a proceeding and ordered IOCR to respond to UTU’s discovery requests.⁴ IOCR produced redacted documents to UTU on December 3, 2004. After UTU requested unredacted documents, IOCR filed a Motion for Protective Order, which the Board granted.⁵ IOCR provided unredacted documents to UTU on December 28, 2004.

In the Supplement, UTU argues that the Notice should be revoked because it contains false and misleading information and because the transaction was not *bona fide*, but instead was designed to remove jobs from under a UTU collective bargaining agreement with CSXT. For the

from CSXT, but only leased the real estate (the “Real Property”) from CSXT.

³ *Indiana & Ohio Central Railroad, Inc.–Acquisition and Operation Exemption–CSX Transportation, Inc.*, STB Finance Docket No. 34536 (STB served October 1, 2004).

⁴ *Indiana & Ohio Central Railroad, Inc.–Acquisition and Operation Exemption–CSX Transportation, Inc.*, STB Finance Docket No. 34536 (STB served November 23, 2004).

⁵ *Indiana & Ohio Central Railroad, Inc.–Acquisition and Operation Exemption–CSX Transportation, Inc.*, STB Finance Docket No. 34536 (STB served December 23, 2004).

reasons set forth below, UTU's allegations are without merit, and therefore, IOCR respectfully requests that the additional request to revoke the exemption made in the Supplement be denied.

ARGUMENT

IOCR contends that UTU has not justified revocation of the notice of exemption and respectfully requests the Board to deny the relief sought in the Supplement.

I. The Notice Of Exemption Does Not Contain False Or Misleading Information.

UTU alleges "that the notice of exemption contains false and misleading information". Supplement at 2. However, nowhere in the Supplement does UTU specify the "false and misleading information."

In this proceeding, IOCR is a carrier seeking to expand its common carrier operations over the Line through a purchase and lease under the Agreement from CSXT. As such, IOCR was required to obtain approval from the Board to commence operations under 49 U.S.C. § 10902(a). In order to expedite and encourage the expansion of existing short line railroads, the Board adopted a class exemption from the approval process under section 10902.⁶ The Board's rules implementing the exemption require a party filing a notice of exemption to provide certain information (49 C.F.R. § 1150.43) and to verify the accuracy of the information presented (49 C.F.R. § 1150.42(a)).

The Notice provided all of the information required by 49 C.F.R. § 1150.43. The accuracy of the information in the notice was verified by Mr. Larry W. Bush, Vice President of IOCR.

⁶ *Class Exemp. for Acq. or Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996).

UTU, as petitioner, “must demonstrate that the notice contains false or misleading information.”⁷ In *Minnesota Northern*, the labor petitioners made five specific arguments concerning false and misleading information that was contained in the notice. The Board rejected all of labor petitioner’s arguments concerning false and misleading information because they were minor, of no consequence, or *de minimis*.⁸ In this proceeding, UTU has not specifically identified any portions of the Notice that are false or misleading. UTU merely makes the statement without any support or specificity. As the party that must “demonstrate” false and misleading information, UTU has failed to meet its burden.

Since UTU has failed to demonstrate the existence of any false and misleading information in the Notice, and since there is no false or misleading information in the Notice, IOCR respectfully requests the Board to deny UTU’s request to reject the Notice on that basis.

II. The Underlying Contracts Do Not Provide A Basis for Revocation.

UTU contends that in this proceeding there are “several unusual features which can only lead one to conclude the transaction is a device created merely to move a number of jobs out from under a collective bargaining agreement (CSXT) onto a nonunion carrier (IOCR).” Supplement at 8. IOCR takes strong exception to UTU’s claim that it is a nonunion carrier. As was stated in IOCR’s October 1, 2004 response, BLET represents IOCR operating employees.

UTU further alleges that the “circumstances surrounding the transaction indicate that the transaction was not motivated by a desire of the parties to realize legitimate business goals,” Supplement at 8, without ever identifying what those circumstances are. UTU’s inchoate arguments provide no basis for revocation of the Notice.

⁷ *Minnesota Northern Railroad, Inc. –Exemption–Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company*, STB Finance docket No. 33315 (STB served August 14, 1997), at 3 (“*Minnesota Northern*”).

UTU next claims that “IOCR was not a logical entity to be considered as the operator.” Supplement at 8. UTU has failed to explain the relevance of a logical operator or present the factors necessary for determining a logical operator. Regardless of the relevance of UTU’s argument, IOCR is actually the most logical short line operator of the Line. IOCR’s lines connect with the Line at Midland City, OH and Washington Court House, OH. IOCR is very familiar with the transportation needs of Ohio shippers between Cincinnati and Columbus because of its lengthy presence in the market. IOCR was the successful bidder for the Line, and also connects to the Line.

UTU then adopts its own faulty logic and contends that this transaction is similar to a transaction where a notice of exemption was revoked.⁹ UTU fails to explain how *Saganat II* allegedly relates to the present matter. *Saganat II* is totally distinguishable from the present proceeding. In *Saganat II*, Sagamore National Corporation (“Saganat”) filed a notice of exemption to acquire 398 miles of rail from Indiana Hi-Rail Corporation (“Hi-Rail”), which the Interstate Commerce Commission (the “ICC”) rejected. In doing so, the ICC relied upon reasons that have no application in the present proceeding. For instance, the ICC concluded that the evidence in *Saganat II* showed “substantial identity in interest between Hi-Rail and Saganat,” because Hi-Rail and Saganat had the same address and both entities had the same president. *Id.* In addition, the ICC had previously noted that Saganat and Hi-Rail had the same general counsel, the same executive vice president, and the same office manager.¹⁰ The ICC also noted UTU’s

⁸ *Id.*, at 3-5.

⁹ *Sagamore Nat’l Corp. – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail Corp.*, ICC Finance Docket No. 32523 (ICC served October 28, 1994) (“*Saganat IP*”).

¹⁰ *Sagamore Nat’l Corp. – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail Corp.*, ICC Finance Docket No. 32523 (ICC served August 26, 1994) (“*Saganat I*”).

assertion that two senior executives of Hi-Rail comprise a majority of Saganat's interim Board of Directors. *Id.*

In contrast to the circumstances in *Saganat I* and *Saganat II*, there is no claim that IOCR and CSXT are not separate and independent entities. CSXT has no ownership interest in IOCR, which is an independent carrier. There is no overlap in management between the two carriers. Furthermore, unlike in *Saganat I* and *Saganat II*, the parties in the present proceeding entered into arm's length transactions for legitimate business purposes.

UTU argues that a number of the terms in the contracts between IOCR and CSXT contain unusual features, are not for legitimate business purposes, or create less than an arms length arrangement between IOCR and CSXT. UTU is wrong. IOCR has purchased the Improvements and leased the Real Property.

Under the Agreement, CSXT clarified the rights it was reserving in the Real Property, imposed certain restrictions on IOCR's use of the Real Property, and required certain obligations from IOCR, all as IOCR's landlord. IOCR agreed to the provisions in the Agreement that clearly delineate the benefits of ownership retained by CSXT, the limits on IOCR's use of CSXT's Real Property, and the obligations incurred by IOCR to protect the Real Property. UTU attempts to cast a shadow over these reservations, restrictions and obligations that normal in real estate leases without even explaining how these provisions are anything other than normal and the result of arms-length negotiations between willing parties.

UTU questions the limitations on IOCR's ability to grant rights to other railroads to operate on the Line. First, as owner of the underlying real estate, CSXT has an interest in protecting its investment in the real Property. Second, even though CSXT must consent before

IOCR can permit additional rail service on the Line, that consent “shall not be unreasonably withheld, conditioned or delayed.” Supplement at page numbered 7.

UTU questions CSXT’s right to inspect the buildings on the Line, limitations on IOCR using the Line as collateral for public funding, and limitations on the assignment of the lease of the Real Property without CSXT’s advance consent. CSXT remains the owner of the buildings and must have the right inspect its asset. It is also proper for CSXT to be able to prohibit the use of its land as collateral for a loan that IOCR might seek to obtain. As with additional rail service, there is no prohibition against the assignment of the lease of the Real Property; IOCR must merely obtain CSXT’s advance consent if the assignment is not to a subsidiary (no approval is needed for IOCR to assign the lease of the Real Property to a subsidiary). Supplement at page numbered 20.

UTU contends that IOCR is prohibited from building any structures on the Line. The Agreement actually only preserves CSXT’s rights concerning the use of its Real Property by preventing the construction of permanent structures. Supplement at page numbered 21.

On pages 4-5 of the Supplement, UTU notes that CSXT has reserved certain rights to the Real Property, rental related to other uses of the Real Property, and the ability to authorize the use of or alienate Real Property that does not interfere with IOCR’s operations. The Agreement merely enumerates the rights that CSXT has reserved as the owner of the Real Property; CSXT’s reserved rights have nothing to do with IOCR’s common carrier operation of the Line.

There are several provisions where the Agreement requires IOCR to procure insurance to protect CSXT’s interest in the Real Property. It is a prudent business decision to require a tenant to provide insurance to protect the landlord from any potential damage to the Landlord’s Real Property caused by the tenant’s railroad operations.

Under the Freight Operating Agreement (the “FOA”), CSXT bills and collects freight charges and forwards payments to IOCR. This efficient process results in savings for IOCR and provides its customers with only one bill for freight service and one place to make payment. Moreover, CSXT audits the volume of IOCR’s moves to determine whether CSXT’s payments are accurate and whether IOCR owes CSXT any additional rent. IOCR agreed to the requirement of the FOA that it publish certain tariffs to enhance efficiency and allow it to participate in certain rail industry agreements.

Although CSXT is IOCR’s primary source of rail cars, CSXT is not obliged to provide rail cars and is not the exclusive source of rail cars. If CSXT provides a CSXT car to IOCR, then IOCR must meet certain requirements that generally apply to all CSXT rail cars and connections. CSXT is not requiring IOCR to do anything out of the ordinary. IOCR sees nothing wrong with contributing to the efficient movement of cars between IOCR and CSXT or to maximizing the efficient flow of equipment.

UTU also raises the interchange agreements between IOCR and CSXT at Cincinnati and Bloomingsburg, OH. As the Board well knows, every short line railroad must interchange traffic with another railroad. Interchange agreements set forth the rights and obligations of both parties to an interchange and specify where the physical interchange is to occur. Occasionally one railroad is granted access to the other railroad’s line to effect interchange at a convenient location on that railroad. Restricting service along such a line to interchange and prohibiting service to local shippers is typical throughout the railroad industry and goes back to the early days of railroading.

It has been IOCR’s experience that all of the provisions of the Agreement and FOA cited by UTU are typical in the short line railroad business. Indeed, IOCR is a subsidiary of

RailAmerica, and the purchase of the Improvements and lease of the Real Property was negotiated under the same guidelines that have been used for dozens of transactions for other RailAmerica rail subsidiaries. Based on its experience, IOCR concludes that these types of provisions are merely to facilitate the smooth transition and operation of a short line railroad.

The Board has previously rejected vague UTU objections to arm's length transactions such as those at issue in the present proceeding, where independent carriers enter into arrangements to meet legitimate business goals.¹¹ Like the present proceeding, UTU "questioned the bona fides of the transaction" and argued that the lease was a device created merely to move a number of jobs out from under a collective bargaining agreement to a nonunion carrier. However, the Board rejected UTU's arguments in *P&W*, concluding that the lease was not intended to avoid collective bargaining agreement obligations and that "the circumstances surrounding the transaction indicate that the transaction was motivated by a desire of the lessor and lessee to realize legitimate business goals."¹²

CSXT has retained trackage rights over a 28.65-mile portion of the Line in order to serve three shippers who entered contracts with CSXT. Supplement at pages numbered 27, 52 and 53. It is common practice for the transferor to retain trackage rights when it involves a contract move over the transferor's system and results in more efficient service to the shipper than an interchange with the transferee.

III. The rail transportation policy does not require revocation of the exemption.

UTU has totally ignored the requirement under 49 U.S.C. § 10502(d) that only permits revocation of an exemption when the Board finds that application of regulation is necessary to

¹¹ *Portland & Western R.R., Inc. – Lease and Operation Exemption – Lines of Burlington Northern R.R. Co.*, STB Finance Docket 32766 (STB served October 15, 1997) ("*P&W*").

¹² *Id.* At 5.

carry out the transportation policy of 49 U.S.C. § 10101. UTU has not cited a single provision of the transportation policy that warrants revocation of the exemption. Indeed, the instant arms-length transaction which transfers the common carrier obligation over the Line from CSXT to IOCR fosters many provisions of the transportation policy and is contrary to none. IOCR's purchase of the Improvements and lease of the Real Property from CSXT will permit competition to establish reasonable rate (10101(1)), minimize the need for regulatory control (10101(2)), promote a safe and efficient rail transportation system (10101(3)), ensure development of a sound rail transportation system (10101(4)), foster sound economic conditions in transportation (10101(5)), reduce regulatory barriers to entry (10101(7)), encourage honest and efficient management (10101(9)), and provide for the expeditious handling of this proceeding (10101(15)).

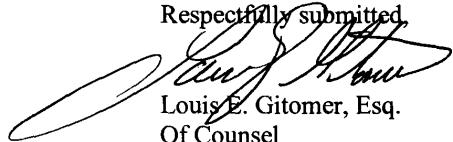
UTU has not claimed that a single provision of the rail transportation policy requires regulation of this transaction and has not justified revocation of this exemption under the statutory standards.

CONCLUSION

UTU has failed to justify revocation of the exemption in this proceeding. The Agreement between IOCR and CSXT is a *bona fide* transaction based on arms-length negotiations, substantial business reasons, and not for the purpose of removing work from under CSXT's collective bargaining agreement with UTU. Accordingly, IOCR respectfully requests the Board to deny the relief requested in the Supplement.

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
INDIANA & OHIO CENTRAL
RAILROAD, INC.
5300 Broken Sound Blvd., NW.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Respectfully submitted,



Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street. NW., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: INDIANA & OHIO
CENTRAL RAILROAD, INC.

Dated: February 2, 2005

CERTIFICATE OF SERVICE

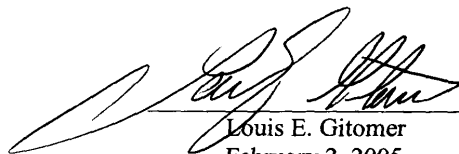
I hereby certify that I have caused the foregoing document to be served upon the following parties by first class mail pre-paid.

Kevin C. Brodar
14600 Detroit Avenue
Cleveland, OH 44107-4250

Daniel R. Elliott, III
14600 Detroit Avenue
Cleveland, OH 44107-4250

Harold A. Ross
1370 Ontario Street, Suite 1548
Cleveland, OH 44113-1740

Ronald M. Johnson
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, D.C. 20036-1564



Louis E. Gitomer
February 2, 2005